United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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75-2106

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

UNITED STATES OF AMERICA ex rel. FRED EDWIN JOHNSON,

Appellant,

-against-

VINCENT B. MANCUSI, Superintendent Attica Correctional Facility,

Appellee.

- X

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P/S

On appeal from the United States District Court for the Southern District of New York

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APPELLANT'S REPLY BRIEF

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TABLE OF CASES

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Appellee's statement of the issues before this Court begs the questions raised by appellant and in so doing ignores the points raised by appellant.

I

The first issue is defined by appellee as:

> "Does an erroneous sentence estimate by defense counsel entitle appellant to habeas corpus relief?"

It is conceded by appellant that the answer to that question is "No". But this is not the issue in the case at bar. Appellant asserts that misrepresentation by counsel resulting in a guilty plea requires that that plea be set aside because it does not reflect a voluntary, knowing and understanding act.

The case was submitted to the District Court below (Judge Duffy) on the record of the State coram nobis hearing.

That record included uncontradicted testimony of the lawyer acting for petitioner. He said that the defendants assumed from his advice that they were assured of the six month maximum sentence prior to their plea of guilty -- and further when they found out, prior to sentence, that the assurance was a misrepresentation, they wanted their pleas withdrawn (See Appellant's Br. pp. 9, 10).

Justice Carney, the State judge, in his findings and decision after the State coram nobis hearing, erroneously ruled that there would be no basis in law for setting aside the plea, even if entered because induced by "misrepresentation" (See Appellant's Br. p. 10). Judge Duffy below ignored this finding and attempted to distinguish Mosher v. La Vallee, 491 F.2d 1346 (2 Cir. 1974) cert. den. 416 U.S. 906, and United States ex rel Oliver v. Vincent, 498 F.2d 340 (2 Cir. 1974) by stating:

> "In both Mosher and Oliver courts relied upon misrepresentations by defense counsel, believed by the defendants, that a promise of leniency had been made, as the basis for finding that the guilty plea had been involuntarily entered." (A-19)

In fact, the State court found misrepresentation, but did not consider the misrepresentation of counsel sufficient to invalidate the plea (A-7). Judge Duffy made the same error as Justice Carney requiring reversal by this Court on this appeal.

II

The second issue framed by appellee does not contain within its four corners the claimed inadequacy of counsel based

on that counsel's admitted misunderstanding and misapplication of the law concerning the basis for a withdrawal of a plea of guilty. The defense lawyer failed to advise the court that the reason for the motion to withdraw the plea before sentence was the defendant's being told for the first time that there was no promise of a six-month sentence.

Moreover this situation was compounded by the defendant-petitioner being denied his right to allocution at the time of sentence -- a right granted to him under New York law. Petitioner stated that he tried to speak both at the time of sentence (and at the time of plea), but that a court officer put his hand over his mouth (see Appellee's Br. p. 16).

Appellee urges the result as proof that petitioner had the effective assistance of counsel. The result was a plea of guilty to a reduced charge of a multicount indictment. If this be the only test, there seems little purpose to the line of law outlined in Machibroda v. United States, 368 U.S. 487 (1962) concerning the definition of the entry of a voluntary plea. Nor, says appellee, must this Court concern itself with the additional issue of conflict of interest or other considerations of like kind since the petitioner had the advantage of bargaining for a diminution of charges. Cf. United States ex rel Maselli v. Reincke, 383 F.2d 129 (2 Cir. 1967).

There is no dispute in the record. Defense counsel

misled petitioner and then failed to advise the trial court of the true situation. As a result petitioner's motion to withdraw his plea was denied.

CONCLUSION

Under these circumstances petitioner's plea was not voluntary and the Court should reverse the court below.

Respectfully submitted,

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Appellant

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2 Copies Received

Date November 6 1975

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By Arlene R. Silverman